IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED: 7.7.2006

CORAM:

THE HONOURABLE MR.JUSTICE R.SUDHAKAR

C.M.A.No.325 of 1999

R.Duraisamy .. Appellant

vs.

1. D.Arumugam

2. The Managing Director,
Anna Transport Corporation,
Seerangapalayam,
Ramakrishna Road,
Salem-7. .. Respondents

Civil Miscellaneous Appeal filed under Section 173 of Motor Vehicle Act against the award and decree dated 17.3.1994 in M.C.O.P.No.407 of 1991 on the file of the Motor Accidents Claims Tribunal (Principal Sub-Court), Salem.

For appellant : Mr.T.P.Prabhakaran for
Mr.M.Sathyanarayanan

For respondents: No appearance for R-1
Mr.P.Jagadeeswaran for R-2

JUDGMENT

This is an appeal filed by the injured-claimant seeking for enhancement of the compensation awarded by the Tribunal.

2. Brief facts of the present case are as follows:

On 15.5.1991, the appellant-claimant was travelling in his TVS-50 vehicle on the Attur-Rasipuram main road. While he was travelling at the spot, by name Olamedu bend near Kamaraj Nagar at about 6.30 p.m., the bus belonging to the Transport Corporation bearing Registration No.TMS-7028, was coming from the opposite direction and while negotiating with the said bend, it was overtaking a standing lorry. At the same time, the two-wheeler driven by the claimant was passing the lorry and in view of the congestion and little space available at that point of time, the two-wheeler and the Transport Corporation Bus colluded with each other. Due to such accident, the rider of the two-wheeler, the appellant-claimant, suffered certain injuries. Along with the claimant, there was a pillion rider, a young boy, who also suffered injuries. It is stated by the appellant-claimant that he was treated initially at the Government

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Hospital and subsequently he was treated in a private hospital at Salem for a considerable period of time. Consequent thereupon, a claim petition under Section 166 of the Motor Vehicles Act was filed, seeking compensation for a sum of Rs.2,07,000/- which however was restricted to Rs.1,50,000/-.

3. The claimant examined himself as P.W.1. P.W.2 is the father of the pillion rider, who was also a claimant before the Tribunal. The pillion rider was examined as P.W.3. P.W.4 is one Dr.Natarajan. The following documents were filed in support of the claim petition: Ex.P-1 is the copy of the FIR, Ex.P-2 is the wound certificate. Ex.P-3 is the copy of the charge-sheet filed in Criminal Court. Ex.P-4 is the copy of the Motor Vehicle Inspector's report. Ex.P-5 is the rough sketch. Ex.P-6 series are the medical bills. Ex.P-7 is the prescription, Ex.P-8 is the Doctor's certificate for medical treatment. Ex.P-9 is the salary certificate. Ex.P-10 is the wound certificate relating to the pillion-rider and Ex.P-11 is the disability certificate.

4. On behalf of the respondents, the driver of the bus was examined as R.W.1 and the judgment of the Criminal Court-Judicial Magistrate No.1 in Summary Case Trial No.1131 of 1991, dated 25.11.1993, was filed as Ex.R-1.

5. The Tribunal, considering the rival claims, held that both the vehicles are responsible for the accident and passed an award for Rs.25,700/- and fixed 50% liability on the Transport Corporation and the appellant-claimant. The Transport Corporation was made liable to pay Rs.12,850/- under various heads as follows:

(i) loss of one month salary	: Rs.2,400/-
(ii) medical expenses	: Rs.1,800/-
(iii) 18% permanent disability	: Rs.15,000/-
(iv) pain and suffering	: Rs.5,000/-
(v) transport to hospital	: Rs.500/-
(vi) nutrition diet	: Rs.1,000/-

6. The appellant-claimant being aggrieved by the findings of the Tribunal and fixing only 50% liability on the driver of the Transport Corporation Bus and also aggrieved by the quantum, has come before this Court.

7. On the question of negligence and liability, learned counsel for the appellant-claimant strongly relied upon the evidence of the driver of the bus and would submit that R.W.1 driver has stated in his cross-examination that the Transport Corporation Bus left Mangalapuram at 6.00 p.m. and should reach Attur at 6.50 p.m. In other words, the travelling time between Mangalapuram and Attur is 50 minutes to cover a distance of 29 Kms. It is also stated by the driver in his cross-examination that he had covered 25 Kms. and reached the accident site at 6.30 p.m., i.e. 4 Kms. short of Attur in 30 minutes. It is therefore contended by the learned counsel for the appellant-claimant that even as per the evidence of R.W.1 driver, it is

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clear that the bus was driven in great speed and in a rash and negligent manner and the bus while overtaking a stationary lorry at the time of the accident should have taken due care and caution. If such care and caution had been taken by the driver of the Bus, the accident would not have happened.

8. Learned counsel for the appellant-claimant would rely upon the decision of this Court reported in 1998 (1) L.W. 660 (Manickkam and 2 others vs. Ramasamy and others) and submitted that it is the duty of the driver while overtaking to observe care and caution and ensure that no vehicle coming in the opposite direction is affected and there is a clear passage for him to overtake.

9. Learned counsel for the appellant-claimant also relied on a judgment of a Division Bench of this Court reported in 2006 (1) T.N.L.R. 1 (Mad) (The Managing Director, Metropolitan Transport Corporation Ltd., Pallavan House,Chennai vs. Janaki and others) to support the plea of negligence on the part of the driver of the Transport Corporation Bus. It was contended by learned counsel for the appellant that the driver of the Transport Corporation Bus did not observe necessary degree of care, precaution and vigilance which the circumstances demanded and consequently the appellant/claimant had suffered injuries due to the accident.

10. As regards the finding of the Tribunal with regard to the decision rendered by the Criminal Court, which has held that the driver of the Transport Corporation Bus is not wholly responsible for the accident, learned counsel for the appellant-claimant would plead that the decision of the Criminal Court is not binding on the Tribunal.

11. Reliance has also been made to the provisions of Section 42 of the Evidence Act to say that the Tribunal should not be misled to mulct the liability also on the appellant-claimant solely on the ground that the Criminal Court has acquitted the driver of the Transport Corporation Bus. Learned counsel would further state that the Tribunal has failed to come to an independent conclusion and find out as to who is at the fault.

12. Learned counsel for the appellant-claimant would further plead that even by the nature of the accident, on the evidence of the driver of the Transport Corporation Bus, the Tribunal ought to have held that the driver of the Transport Corporation Bus alone is responsible for the accident and the finding of the Tribunal that the appellant-claimant is also liable on account of contributory negligence, is without any evidence and the findings are based on conjectures and surmises and have to be set aside.

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13. As regards the quantum of compensation, learned counsel for the appellant-claimant would plead that the Tribunal had awarded paltry sum for the loss of earning as against the claim. Further, the various amounts awarded by the Tribunal are insignificant and not commensurate with the nature of injuries suffered by him and the effect of such injuries is having a great impact on the future earning capacity. The pain and suffering of the appellant has not been properly considered by the Tribunal. Learned counsel for the appellant-claimant therefore pleads for enhancement of the award and in any event, holding that the claimant is also responsible for the accident by way of contributory negligence, was not correct on the facts and circumstances of the case.

14. Per contra, learned counsel appearing for the Transport Corporation would submit that no doubt, there was some element of rash and negligence on the part of the driver of the Transport Corporation Bus which is apparent on the face of the cross-examination of R.W.1, but would submit that the Tribunal has come to the conclusion that appellant-claimant was also negligent. He would also contend that since the two-wheeler of the appellant had hit the rear end of the Transport Corporation Bus, the finding of contributory negligence is correct. It was pleaded by learned counsel for the second respondent-Transport Corporation that the appellant-claimant who was driving the two-wheeler, was equally responsible for the accident in question.

15. As regards the quantum of compensation awarded by the Tribunal, learned counsel for the Transport Corporation would plead that the disability certificate is contrary to the wound certificate. There is no fracture or plate fixed on the leg. Therefore, the evidence of the Doctor has to be eschewed. There is no document filed by the appellant regarding his employment and Ex.P-3 charge-sheet is vague and not supportive of the claim. There is no name in the medical bills and there is no proper prescription for purchase of the medicines by the appellant. It was further submitted that there is no proof that the appellant was treated for 23 days as in-patient. The Tribunal having awarded the compensation in respect of the 18% disability, there is no question of awarding compensation for loss of earning power. The award should be in either one of the two heads and not separately on these two heads. In support of the same, learned counsel for the Transport Corporation would rely upon a Full Bench decision of the Kerala High Court reported in 2006 (1) C.T.C. 81 (Oriental Insurance Co. Ltd. vs. Hariprasad).

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16. Having considered the pleadings on either side and perused the records available before this Court, the following two issues arise for consideration:

(i) Whether the appellant-claimant is guilty of contributory negligence to the accident in question? and

(ii) Whether the compensation awarded is just and reasonable on the facts and circumstances of the case?

17. Regarding the first issue, no doubt, the Tribunal held that the Criminal Court has come to the conclusion that the driver of the Transport Corporation Bus is not solely responsible for the accident. The Tribunal however has come to the conclusion that the negligence lies equally on the appellant-claimant and on the driver of the Transport Corporation Bus. The Tribunal has come to such a conclusion based only on the judgment of the Criminal Court which has observed that the driver of the TVS-50 vehicle is also responsible for the accident. What the Criminal Court has observed is that the prosecution witness (who is the appellant-claimant) has stated that he has finished night duty and while returning back, the accident had happened and therefore, the Criminal Court came to the conclusion that the appellant-claimant would have been negligent in driving due to lack of sleep and therefore, while negotiating the bend, he was careless and hence, the Criminal Court came to the conclusion that the driver of the Transport Corporation Bus alone cannot be held responsible for the accident.

18. The evidence of the Driver of the Transport Corporation Bus before the Tribunal on the contrary is very clear that he had started the bus at about 6.00 p.m. at Mangalapuram and reached Kamaraj Nagar Bus Stop at about 6.30 p.m. He further deposed that near the site of the accident, a lorry was standing in front of him and at that time, TVS-50 driven by the appellant-claimant came in a rash and negligent manner and therefore, he had to slow down the vehicle and overtake the lorry and at that point of time, the TVS-50 dashed against the Bus. However, in his cross-examination, it was clearly elicited that the driver had travelled 25 Kms. in half an hour and has almost reached the final destination, namely Attur, short of 4 Kms. from the site of the accident. It is also elicited through cross-examination that the travelling time between Mangalapuram and Attur is 50 minutes and that he had already covered 25 Kms. within 30 minutes. A suggestion was made to the driver of the Transport Corporation Bus to state that on the basis of such evidence, it is clear that he was driving the bus in a rash and negligent manner, which was however denied by the driver. From the evidence of R.W.1, it is clear that the vehicle had covered 25 kms. in 30 minutes. Therefore, the driver had only 4 kms. to

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cover in 20 minutes. The conduct of the driver of the Transport Bus speaks for itself.

19. On going through the proceedings of the Criminal Court, it is clear that the situation which has been elicited in the cross-examination by the counsel for the appellant-claimant before the Tribunal, is not found in the proceedings before the Criminal Court. The fact that the Transport Corporation Bus was overtaking the lorry was also not referred to. Even the sketch does not show the lorry. Obviously, the investigation was done in a shabby manner. It is trite that the proceedings of the Criminal Court are not binding on the Tribunal. The Tribunal has to rely upon the materials placed before it. The Tribunal has to come to an independent conclusion. In this case, the Tribunal has failed to advert to the cross-examination of the driver of the Transport Corporation Bus, much less, there is no discussion as to how the liability has been apportioned equally on the driver of the Transport Corporation Bus and the claimant.

20. On going through the materials and the evidence before the Tribunal and the nature of the accident-site which is said to be a bend on the main highway, the admitted fact as deposed by the bus driver is that the Transport Corporation Bus had overtaken the standing lorry and while doing so, the accident had happened, which would clearly go to show that the driver of the Transport Corporation Bus has not taken due care and cation to reduce the speed and allow the two-wheeler of the appellant-claimant to pass-by. If due care and caution had been taken by the driver of the Transport Corporation Bus to allow the two-wheeler to pass-by, the accident would not have happened.

21. In the case referred to by learned counsel for the appellant-claimant in 1998 (1) L.W. 660 (cited supra), has clearly held by this Court as follows:

> "7. One thing is clear from the pleading as well as the evidence let in before the Court. That is the van was overtaking a lorry going in the same direction and that the accident took place either in the process of the van overtaking the lorry or immediately after it overtook the lorry. Therefore, there is a heavy duty cast upon R.W.1 while he was overtaking a lorry going ahead of him in the same direction. He cannot as a matter of right simply overtake a vehicle going ahead of him solely on the ground that the driver of the vehicle going ahead of him gave clearance. He must also take care to see that there is no vehicle coming in the opposite direction or he must overtake only when there is a clear passage for him to overtake. From the facts available in this case, I am able to find that the driver of the van viz.,

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R.W.1 had not taken even the elementary precaution to avoid the overtaking when a vehicle is coming in the opposite direction. The evidence of P.W.2 as already stated in the cross-examination is that the lorry in which he was travelling was proceeding on the eastern side of the road. Simply because he had stated that the accident took place in the middle of the road that does not necessarily lead to the conclusion that the driver of the lorry was also responsible for the accident. Therefore, on the broad probabilities of the case, I am fully convinced to hold that it is only the driver of the van who is wholly responsible for the accident in question, and it cannot be held that the driver of the lorry was also either equally or to a lesser extent responsible for the accident. I am strengthened in my finding by Exs.A-3 and A-4, the respective Motor Vehicles Inspector's Report for the van and the lorry. Ex.A-3 shows that the van had several extensive damages on its front side whereas Ex.A-4 shows that the lorry had suffered damages only on its right side. Therefore, it is clear that the van should have come into contact with the right side of the lorry coming in the opposite direction while it was overtaking. Therefore, the theory of head-on collision inadvertently mentioned in Ex.A-1 and in the evidence of P.W.2 is completely ruled out. Therefore, I am constrained to hold that the van belonging to the third respondent alone is responsible for the accident as its driver was definitely guilty of rash and negligent driving." (emphasis supplied)

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22. In 2006 (1) T.N.L.R. 1 (Mad) (cited supra), it is held by a Division Bench of this Court as follows:

"5. We have perused the judgement of the Tribunal and have given careful consideration to the submission of the counsel for the appellant. It is trite that the precept of 'negligence' means the failure to observe, for the protection of the interests of another person, that degree of care, precaution and vigilance which the circumstances justly demand, whereby such other person suffers injury. The test of negligence lies in default to exercise the ordinary care and caution which is expected

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of a prudent man in the circumstances of a given case. The duty to exercise such care and caution including reasonable use of his faculties of sight and intelligence to observe and appreciate danger or threatened danger of injury is undoubtedly on the driver of an automobile. If he fails to do so and such failure is the proximate cause of the injury or death, he is guilty of negligence. In other words, the test is whether the driver could, by exercising normal diligence and caution, avert the accident. Negligence is the omission to do which a reasonable man guided upon by considerations, which ordinarily regulate the conduct of human affairs, would do or doing something which a prudent and reasonable man would not do. The negligence is not a question of evidence; it is an inference to be drawn from proved facts. Negligence is not an absolute term, but it is a relative one; it is rather a comparative term. Where there is a duty to exercise care, reasonable care must be taken to avoid acts or omissions which could be reasonably foreseen to be likely to cause physical injury to persons. The degree of care required, of course, depends upon the facts in each case *vide M.N.Rajan and others* vs. *Konnali Khalid Haji and another* reported in 2004 ACJ 484." (emphasis supplied)

23. Therefore, it is clear that the driver of the Transport Corporation Bus had driven the bus in a rash and negligent manner and he is only responsible for the accident in not having taken proper care and caution while negotiating the bend and thereby caused the accident. The right of the way is to the appellant-claimant. The fact that the driver of the bus was driving in high speed is clear from the cross-examination. In such view of the matter, the finding of the Tribunal determining the negligence on the appellant-claimant also is erroneous. I therefore hold that the driver of the Transport Bus was negligent in driving the bus and he is solely responsible for the accident and the Transport Corporation alone is liable to pay the compensation.

24. As regards the quantum of compensation on the head of loss of earning, the evidence of P.W.1 claimant is that he was in-patient for 23 days after being treated in the Government Hospital for few days. Such treatment was taken at Kamala Nursing Home, Agraharam, Salem and the Doctor who has treated the claimant is Dr.C.S.Krishnamurthy, an orthopaedic-specialist.

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Ex.P-6 series are the prescriptions and medical bills for treatment between the period 15.5.1991 and February 1992 and all these prescriptions are relating to the abovesaid period. In addition to the same, Ex.A-8 is the medical certificate given by the said Dr.C.S.Krishnamurthy, which clearly says that the appellant-claimant had suffered fracture on the femur and the Doctor had performed plating on the femur on 15.5.1991, which was removed on 26.12.1991 and a sum of Rs.4,000/- was incurred for the said procedure, namely for the two operations.

25. As regards the income of the appellant-claimant is concerned, the Tribunal has accepted that the income of the claimant is Rs.2,400/- p.m. Such finding of the Tribunal is not disputed.

26. The evidence of the Doctor is that the claimant was in-patient for 23 days and that he was further treated for a period of more than six months, which period is evident from various medical bills and Ex.A-8 certificate. However, even assuming that the claimant was in-patient for 23 days only, the appellant-claimant would have rested for a few months going by the nature of injury and the treatment given, which is evident from Ex.A-8 certificate. The appellant-claimant is entitled to claim loss of income for atleast three months.

27. Since the appellant-claimant had produced records to the effect that he has been under medical treatment for more than six months, a reasonable amount should have been granted towards nourishment.

28. The appellant has been suffering due to the accident in question for more than three months and has been in continuous treatment for six months. The Tribunal has awarded a sum of Rs.5,000/- for pain and suffering. Such amount obviously is on the lower side and cannot be said to be just and fair.

29. As regards the permanent disability which was certified by the Doctor at 18%, a sum of Rs.15,000/- has been granted which is also meagre.

30. There is a claim under the head "loss of earning power". No amount has been awarded by the Tribunal under that head. However, the appellant/claimant would seek compensation under this head also. There is no evidence by the appellant-claimant to show that due to the aforesaid injuries, there is a loss of earning power except bald statement. The contention of the second respondent-Transport Corporation has to be accepted.

31. Taking into consideration the facts and circumstances of the case and the observations and findings as above, the total compensation is fixed by this Court at Rs.51,800/- under the following heads:

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(i) transport to hospital	: Rs.2,000/-
(ii) extra-nourishment	: Rs.7,500/-
(iii) pain and suffering	: Rs.20,000/-
(iv) continuing permanent disability	: Rs.20,000/-
(v) damages to clothing and articles	: Rs.500/-
(vi) medical expenses	: Rs.1,800/-

32. The compensation awarded by the Tribunal at Rs.12,850/- will carry interest at 12% as awarded by the Tribunal and the enhanced compensation of Rs.38,950/- will suffer interest at 7.5% per annum from the date of petition till the date of deposit. The liability to pay such amount rests solely on the Transport Corporation.

33. The appeal is allowed in the above terms. No costs.

cs

Sd/
Asst.Registrar

/true copy/

Sub Asst.Registrar

To

1. The Principal Subordinate Judge
The Motor Accidents Claims Tribunal
Salem

2. The Record Keeper,
VR Section, High Court, Madras

+ one cc to Mr. M. Sathyanarayanan, Advocate sr no. 29528

JRG(CO)
NM(07.11.2006)

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